BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SARAH A. CHINN	)	
Claimant	)	
	)	
VS.	)	
	)	
TOM & SUE'S FOOD MART	)	
Respondent	)	Docket No. 1,023,992
	)	
AND	)	
	)	
CONTINENTAL WESTERN INS. CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the May 17, 2006 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The Administrative Law Judge (ALJ) found that claimant had established it was more probably true than not that she sustained an accidental injury while working for respondent and that her injury arose out of and in the course of her employment. The ALJ also specifically found claimant provided the requisite notice to her employer. Thus, claimant was granted the benefits she sought under the Workers Compensation Act.

The respondent requests review of this determination alleging the claimant failed to establish that she sustained a compensable injury. Respondent contends that claimant was terminated in June 2005 for non-injury related reasons, and that her first treatment for her bilateral carpal tunnel complaints did not occur until September 2005, well after she left respondent's employ and while she was employed by another. Respondent also maintains claimant failed to give notice of her injury in a timely manner as required by K.S.A. 44-520. Thus, respondent urges the Board to reverse the ALJ's preliminary hearing Order.

Claimant argues that she met her evidentiary burden of establishing a compensable injury and that the ALJ's preliminary hearing Order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

For the past 13 years claimant worked for respondent as a cashier/stocker. In addition to checking out customers and their purchases, her job duties included stocking the cooler with soda, beer and milk in varying sizes and weights. She also had to remove 55 gallon trash bags from trash cans, stock merchandise, wash the gas pumps and the parking lot, and sweep and mop the entire store.

Over the past 3-4 years she noticed some numbness in her hands and a loss of grip strength. Nonetheless, she continued to perform her normal work duties. Claimant suffered a work-related injury to her right shoulder on January 29, 2004. In connection with that claim, claimant sought an evaluation from Dr. Pedro Murati on March 30, 2005. Dr. Murati not only evaluated claimant's right shoulder complaints and resulting permanency, he also diagnosed bilateral carpal tunnel syndrome which he concluded was "not related to the work injury on 1-29-04."[1]

Claimant testified that she took Dr. Murati's report, which included the diagnosis of bilateral carpal tunnel, to her employer the next day. She testified:

> I told him, I am just more than sure that it [the carpal tunnel] is work related. I said, I need to fill out a form; and he wouldn't give me or never gave me a form. Every time I asked him, he would just put it off. Then I asked him again, and he came in and told me that it was not an accident, that it was something else.[2]

Claimant continued to work her regular duties until June 9, 2005. On that date respondent terminated claimant's employment purportedly because she used too much bleach in the water while mopping the floor. Claimant obtained subsequent employment as a relief cashier. According to her, her bilateral hand symptoms have subsided somewhat as her work activities at her new employer are not nearly as repetitive, nor is she required to lift heavy items. Thereafter, claimant and respondent resolved her shoulder claim on August 11, 2005.

On July 14, 2005, claimant filed an Application for Hearing with the Division of Workers Compensation seeking compensation for her bilateral carpal tunnel complaints

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[1] P.H. Trans., Cl. Ex. 1 at 2 (Murati's IME Report).

[2] *Id.* at 15.

stemming from her repetitive work activities culminating on June 9, 2005, her last date worked. Although treatment was initially provided with Dr. Cochran, respondent refused to authorize the treatment recommended by Dr. Cochran as it contends claimant's "date of injury did not occur during her employment with [r]espondent, or at the time of her termination. . ."[3] And respondent contends that the delivery of Dr. Murati's written report which references claimant's diagnosis does not satisfy the notice requirement because the report "certainly did not give the [r]espondent any reason to believe that the [c]laimant's condition was related to employment."[4]

The ALJ concluded claimant met her evidentiary burden and awarded benefits. She specifically concluded "it is more probably true than not true, that she was injured while working for respondent, and that her injury arose out of and in the course of her employment."[5] She also found that proper notice was provided.[6]

The Board has considered respondent's arguments as well as the record as a whole and finds the ALJ's preliminary hearing Order should be affirmed.

Respondent does not dispute the heavy and repetitive nature of claimant's job duties. Nor does respondent dispute that Dr. Murati's report was delivered just a few days after its issuance on March 30, 2005. Claimant's testimony, which is unchallenged, is that she told her employer that she had been diagnosed with bilateral carpal tunnel syndrome and "*I told him, I am just more than sure that it is work related.*"[7] While Dr. Murati's report indicates her carpal tunnel syndrome was not related to her January 2004 shoulder injury, his report says nothing about its connection to her ongoing work activities. Thus, as of March 30, 2005, the uncontroverted evidence is that claimant had been diagnosed with her condition and had informed respondent of the diagnosis and its connection to her work activities.

In order to accept respondent's argument that claimant's date of accident occurred after she left its employ (and while in another's employ) and that it had no knowledge of this condition or her diagnosis, the Board would have to wholly disregard claimant's testimony, which is unchallenged, and ignore the nature of her work for this respondent and her ongoing complaints.

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[3] Respondent's Brief at 5 (filed Jun. 27, 2006).

[4] *Id.*

[5] ALJ Order (May 17, 2006).

[6] *Id.*

[7] P.H. Trans. at 15.

Under Kansas law, the date of accident in a micro-trauma case, which this is, is the last day the claimant performed services for his or her employer or was unable to continue a particular job and moved to an accommodated position not substantially the same as the previous position.[8] Under these facts, claimant's date of accident was June 9, 2005, the date she last worked for respondent. Had claimant gone on to perform substantially similar work for another employer, then her accident date may very well have been sometime later. But here, claimant testified that her repetitive work activities for this respondent were responsible for her symptoms and that after she left her job, her symptoms lessened. Thus, June 9, 2005 is claimant's accident date for her bilateral carpal tunnel complaints as against this respondent and the ALJ's finding with respect to this injury arising out of and in the course of claimant's employment with respondent is affirmed.

Like the ALJ, the Board finds claimant provided notice in a timely fashion. K.S.A. 44-520 provides:

> **Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Claimant testified that she delivered Dr. Murati's March 30, 2005 report to her employer "the next day".[9] She also testified that she told her employer that her bilateral carpal tunnel complaints were attributable to her work activities. This evidence is uncontroverted. Uncontroverted evidence that is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy, and is ordinarily regarded as conclusive.[10] Accordingly, the ALJ's finding with respect to notice is affirmed.

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[8] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

[9] P.H. Trans. at 14-15.

[10] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated May 17, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2006.

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BOARD MEMBER

c: E.L. Lee Kinch, Attorney for Claimant
Douglas D. Johnson, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director